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Supreme Court of the United States

OCTOBER, 1943, TERM.

No. 196

WILLIE GRAY GARRISON, PETITIONER,
VS.
UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States

OCTOBER, 1943, TERM.

No. .....

WILLIE GRAY GARRISON, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

Petitioner, Willie Gray Garrison, respectfully prays that a writ of certiorari issue from this Honorable Court to review a final judgment of the United States Circuit Court of Appeals for the Fifth Circuit, rendered on the 28th day of May, 1943.

SUMMARY STATEMENT.

Petitioner and another were convicted in the Western Division of the Northern District of Alabama on one of two counts, each of which charged one and the same conspiracy under Section 19 of the Criminal Code (18 U. S. C. A. 51). The indictment was drawn on the erroneous assumption that an overt act was a necessary element of the offense. In charging the jury, the trial court fell into this same error, and also erroneously charged that the object of the conspiracy, as charged in the indictment,

was an offense against the United States, obviously confusing the offense denounced by Criminal Code, Section 19, with the offense defined by Criminal Code, Section 37 (18 U. S. C. A. 88), and assuming that some section of the Criminal Code denounced the commission of the acts which might be the objects of criminal conspiracies under Section 19. Moreover, the court charged the jury that:

> "The question for you to determine is, did these defendants, or either of them, oppress or threaten or intimidate Mr. Dorough because of his having reported the activities of the defendant (petitioner) in the whiskey business,"

thereby authorizing the jury to convict if they found that the overt act charged in the indictment, which was also the object of the alleged conspiracy, had actually been committed, without regard to whether or not the defendants had conspired.

Insofar as the two counts charged violation of Section 19, they were identical. Unnecessary and superfluous allegations follow the conspiracy charge in each count, alleging the commission of different overt acts, and this was the only difference between the counts. Although each count charged the same conspiracy, both counts were submitted to the jury under the charge mentioned above. The jury convicted as to Count One, but acquitted as to Count Two. Since the offense charged in each count was one and the same, the jury must have taken the court at its word, and considered whether or not the defendants had oppressed, etc., Dorough for the reasons stated, and must have found that they did so oppress as charged in Count One, but did not oppress as charged in Count Two. Under this, the only consistent interpretation of the record, the jury acquitted as to the conspiracy, which was the only offense charged in the indictment.

On appeal, petitioner brought forward his motion for a directed verdict on the insufficiency of the evidence.

The Court of Appeals found that there was some evidence, under the wide latitude allowed in conspiracy cases, and stated that

> "The circumstances convinced the jury that there was concert of action and community of purpose,"

and thereupon affirmed the conviction, one Judge dissenting on the ground that there was no evidence of conspiracy.

On Petition for Rehearing, petitioner renewed his Motion for New Trial, as filed in the trial court, and urged that the verdict was the result of a mistake of law which had pervaded the entire proceeding. That the Court of Appeals fell into the same error as the trial court is evidenced by the following quotation from its opinion:

> "There was evidence in the record, which the jury evidently believed, upon which it could find that there was an understanding and concert of action between Garrison and Walker, and there is ample evidence of the commission by Garrison of the overt act alleged in the first count. The act of one of the conspirators is the act of all."

The Court of Appeals took no notice of the renewal of the Motion for a New Trial, but overuled the Petition for Rehearing. Therefore, there is open for consideration by this court, the question of whether the Motion for New Trial was open for consideration by the Court of Appeals on questions of law. There are also questions as to whether or not the motion has been acted upon by the Court of Appeals, and what disposition of the cause a proper consideration of the motion would require.

As shown by the majority and minority opinions, the evidence of conspiracy was either very slight, or completely nonexistent. Petitioner contends that the trial court should have directed an acquittal, and that the Court of Appeals was in error in not reversing on this ground.

An essential allegation of the indictment was that Dorough was a citizen of the United States. While some

witnesses testified as to his place of residence, the court erroneously charged that the evidence showed that Dorough was a citizen of the United States.

OPINION BELOW.

The opinions of the court have not yet been reported, but are set out in the Record (R. 152 *et seq.*). No opinions were filed to explain the action of the Court of Appeals in overruling the Petition for Rehearing and Motion for New Trial (Original Certified Record 175).

JURISDICTIONAL STATEMENT.

Within the time allowed by Rule 11 of the Rules of Criminal Procedure in United States Courts, petitioner invokes the jurisdiction of this court under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, Subsection (a) (28 U. S. C. A. 347), and Rule XXXVIII of the Rules of the Supreme Court of the United States, adopted February 12, 1939.

Petitioner was found guilty by the jury on November 4, 1942 (R. 11). Thereupon he was sentenced and judgment was entered on November 6, 1942 (R. 12). On the same day, Notice of Appeal was filed (R. 120). Within the extended time (R. 16), petitioner filed his Bill of Exceptions (R. 119), and the Transcript of Record was filed in the Circuit Court of Appeals for the Fifth Circuit on February 3, 1943 (R. [illegible]). Thereafter, the cause was submitted to said court on the record and briefs on May 12, 1943 (R. 151), and on May 28, 1943, the judgment of the District Court was affirmed (Original Certified Record 152, 157). Petitions for rehearing were filed by petitioner's original attorney (Original Certified Record 158) and by newly employed attorneys (Original Certified Record 162) on June 16, and June 18, 1943, respectively, all within the time allowed for filing such petitions by Rule 29 of

the Rules of the United States Circuit Court of Appeals for the Fifth Circuit.

On June 25, 1943, the Court of Appeals overruled the petitions for rehearing (Original Certified Record 175), and on the same date entered its order (Original Certified Record 176) staying the issuance of mandate for thirty days to allow petitioner to file this petition to this court. Attention is called to the fact that it is immaterial whether the order of the Court of Appeals overruling the Petition for Rehearing had the effect of overruling the Motion for New Trial, since this court may grant the writ either before or after judgment or decree of the Court of Appeals. Judicial Code, Section 240 (28 U. S. C. A. 347).

QUESTIONS PRESENTED.

1. Whether or not Judicial Code, Section 269, formerly R. S., Sec. 726 (28 U. S. C. A. 391), authorizes the filing of a motion for a new trial in the Circuit Court of Appeals in a case tried in the District Court, where the reasons assigned on such motion present questions of law, or demonstrate that the trial and all subsequent proceedings were had on an erroneous theory of law.

2. Whether or not the grant or refusal by the trial court of a motion for a new trial rests solely in the discretion of the court and can not be reviewed by the Appellate Court, even on questions of law, except for abuse of discretion.

3. Whether or not, after a trial, proceedings subsequent to trial in the trial court, including motion for a new trial; and the consideration of the case on appeal, the entire proceeding having been conducted on a mistaken theory of law, and the mistake not appearing to be prejudicial to appellant until the Appellate Court stated its reasons for affirming; appellant may move in the Appellate Court for a new trial, renewing the grounds alleged in the trial court and adding thereto the ground based upon the mistake of law.

4. Whether or not the various United States Circuit Courts of Appeals (and the Supreme Court of the United States) are "United States Courts" within the meaning of the first sentence of Judicial Code, Section 269 (18 U. S. C. A. 391), which provides that, "All United States Courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in courts of law."

5. Whether or not "Courts of Law" as used in Judicial Code, Section 269 (18 U. S. C. A. 391), includes the Court of the Kings Bench as it was organized and existed on September 24, 1789, whether sitting at *nisi prius*, at bar or *en banc;* and whether or not the organization of the United States District Courts and Circuit Courts of Appeals is analogous to the Court of the Kings Bench in the handling of criminal cases, in that the power to grant new trials is preserved on appeal to the same extent as if the legal questions presented by the record had been reserved by the trial court at *nisi prius* or on application for a *venire facias de novo.*

6. Whether or not the Circuit Court of Appeals for the Fifth Circuit committed error in refusing to entertain petitioner's motion for a new trial, either as presented in the District Court, on the record on appeal, or as renewed in the Appellate Court on a new motion adopting the grounds of the motion already of record and raising questions of law, or new matter tending to show that petitioner had not been properly convicted.

7. Whether or not the jury which returned a verdict against petitioner can be said to have convicted him for any offense denounced by the United States Criminal Code, the court having instructed that the question for the jury to consider was whether or not petitioner had committed certain acts which did not constitute any offense against the United States.

8. Whether or not, under all the facts presented by the record and the legal propositions arising therefrom, petitioner was entitled to a new trial.

9. Whether or not the court below committed error in affirming the conviction of petitioner in the District Court.

10. Whether or not the affirmance of a conviction upon slight evidence can stand when it appears that a mistake of law pervaded the trial and raises doubts as to whether or not the jury actually found the defendant guilty of the offense charged in the indictment.

REASONS FOR ALLOWANCE OF WRIT.

1. The Circuit Court of Appeals, in not passing upon the action of the trial court in overruling the Motion for a New Trial, and in not entertaining the motion filed with it, deferred passing upon the procedural questions concerning motions for new trials as to which:

A. The decisions of this court are not clear, require re-examination, or do not cover the questions here involved.

B. There is an apparent conflict in the decisions rendered by the various Circuit Courts of Appeals.

C. There is an apparent divergence of views held by the judges of the Fifth Circuit Court of Appeals, under which that court does not rely upon its former decisions.

2. The course and conduct of the trial, conviction, and affirmance of the judgment under which this petitioner has been condemned is in violation of the Sixth Amendment to the Constitution of the United States, in that the jury was not properly charged by the court as to the law applicable, but was permitted to convict for conduct not amounting to an offense against the United States.

3. There being fundamental differences between the offense denounced by Criminal Code, Section 19 (18 U. S. C. A. 51), and those defined by Criminal Code, Section 37 (18 U. S. C. A. 88), and no decision of this court as to the quantity and quality of evidence necessary to sustain a conviction, under the former section; so that lower courts are compelled to look to the decisions under the latter section for analogous rulings; this court should consider the sufficiency of the evidence on this record to sustain a conviction under the Criminal Code Section under which the indictment was returned.

4. The questions raised and to be raised on this petition are believed to be of great national importance, and especially so in view of the expansion of rights enjoyed by citizens under Federal Law, which may be protected in the United States Courts only by prosecutions under Criminal Code, Sections 19 to 21 (18 U. S. C. A. 51, 52 54).

PRAYER.

Wherefore, petitioner prays that a writ of certiorari issue under the seal of this court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and proceedings in said court had in Cause Number 10506 on the docket of said court, entitled *Willie Gray Garrison, Appellant,* v. *United States of America, Appellee,* to the end that said cause may be reviewed and determined as provided by the statutes of the United States and the Rules of this court; and that the judgment of the Circuit Court of Appeals entered therein be reversed, and for such other relief as law and the due and proper administration of justice shall demand.

Willie Gray Garrison,
Petitioner.

By D. B. HOLMES,
BEN F. CAMERON,
LESTER E. WILLS,
Meridian, Mississippi,
Counsel for Petitioner.

Supreme Court of the United States

No. .....

WILLIE GRAY GARRISON, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

This application is for review of a judgment of the United States Circuit Court of Appeals for the Fifth Circuit, affirming the conviction of petitioner in the District Court of the Northern District of Alabama on a charge of conspiracy in violation of Criminal Code, Section 19 (18 U. S. C. A. 51).

STATEMENT OF FACTS.

Petitioner and his co-defendant, one Earliest Walker, a colored tenant farmer, were convicted (R. 11) on the first of two counts of an indictment (R. 2-5) charging conspiracy to injure, oppress, threaten, and intimidate one J. G. Dorough because of his having exercised the privilege of informing of violations of the Revenue Laws of the United States. Petitioner was sentenced to five years imprisonment and a fine of $1,000 (R. 13).

After motion for new trial (R. 14) was overruled (R. 11-12), appeal was prosecuted to the Circuit Court of Ap-

peals for the Fifth Circuit (R. 120 *et seq.*) on grounds too numerous and varied to enumerate. The Court of Appeals affirmed (R. 152, 157), one judge dissenting (R. 155).

That part of the first count of the indictment which precedes the semicolon near the center of Page 3 of the Record is identical with that part of the second count of the indictment which precedes the semicolon at the top of Page 5 of the Record. An analysis of these two identical charges will show that they charge all of the necessary elements of the offense denounced by Criminal Code, Section 19, and that they would have been sufficient as against demurrer if neither count had contained any additional charge. An analysis of the matter following the semicolons in both counts will show that the only difference between the two counts is that each one undertakes to charge an overt act, and that the draftsman relied upon a different overt act for each count to charge different offenses. It will also be noted that these alleged overt acts are charged in language which would normally have been used to charge a substantive offense, had the overt act itself been a crime.

It may be inferred from the foregoing analysis that the United States Attorney proceeded under three erroneous conclusions of law. These are: (1) That overt acts were a necessary element of the offense under Criminal Code, Section 19, and that it was necessary to charge them in the indictment; (2) That different overt acts committed pursuant to the same conspiracy would constitute different and additional offenses; and (3) That the overt acts charged in the superfluous portions of the two counts were themselves offenses against the United States. Whatever misapprehensions the United States Attorney may have had, the Judge of the trial court appeared to have been misled by these allegations and the course of the trial. He charged the jury as follows:

> "It is the law, gentlemen, of the United States, under Section 51, Title 18, I believe, of the Code of

the United States, that it is unlawful for anyone, any two or more persons, to conspire, confederate or agree to injure or oppress or threaten or intimidate any citizen of the United States in the exercise of his privileges and rights under the Constitution and laws of the United States. It is also unlawful to injure, oppress or threaten or intimidate anyone, any resident or any citizen of the United States who has exercised his rights and privileges which the Constitution and laws of the United States afford him * * *

"The question for you to determine is, did these defendants, or either of them, oppress or threaten or intimidate Mr. Dorough because of his having reported the activities of the defendant in the whiskey business?

"This law is for a purpose. It is an old law on the statute books of the United States. We have rights and privileges as citizens, when we are citizens, as Mr. Dorough is a citizen of the United States as testified to. * * *" (R. 112).

Notwithstanding the numerous errors assigned on appeal, the principal ground relied upon for reversal in the court below was the insufficiency of the evidence to sustain a conviction; and particularly the lack of evidence to show any confederation or agreement between petitioner and Earliest Walker.

The evidence which the Court of Appeals felt sufficient to sustain the conviction was the testimony of Eliza Brunson (R. 25) that petitioner on May 9, 1942, came to her house (R. 26) in a truck in which he was riding with Walker, got out and walked some distance to where Dorough was seated and committed the overt act alleged in the first count, and that Walker knew that her son had given information to Dorough that petitioner was engaged in the liquor business (R. 32); that when Walker left the truck in which he and petitioner had been riding, Walker carried a pistol with him; and the testimony of Dorough (whose credibility was somewhat impeached, R. 86 to 97) that he had seen petitioner and

Walker riding together in petitioner's truck, together with one P. G. Walker, a brother of the other defendant, on several occasions (R. 66). In its opinion, the court also refers to testimony that Walker held a rifle in his lap while petitioner committed the overt act charged in the first count, but we have been unable to find any such testimony in the record.

In addition to the foregoing, there was evidence that a large whiskey still had been located and destroyed at a point about three miles from petitioner's residence, that Dorough had given statements to the agents of the Alcohol Tax Unit to the effect that petitioner was engaged in the liquor business, that petitioner had been arrested, along with three negroes not including Walker, and charged with maintaining the distillery mentioned above (presumably on information furnished by Dorough); that petitioner had been arrested some several years earlier on a charge of resisting an officer, and that several witnesses considered petitioner a bad man according to the standards of his community. However, it does not appear that the Circuit Court of Appeals considered this last mentioned testimony as being evidence which the jury might have considered in making up its verdict.

In its opinion, the Circuit Court of Appeals said:

> "The circumstances convinced the jury that there was concert of action and community of purpose * * * From these facts and circumstances the jury could have concluded that Walker was not only an informed participant, but that he was the gun-bearer for Garrison, and that Garrison and Walker were not out to shoot rabbits. * * * There was evidence in the record, which the jury evidently believed, upon which it could find that there was an understanding and concert of action between Garrison and Walker, and there is ample evidence of the commission by Garrison of the overt acts alleged in the first count. The act of one of the conspirators is the act of all."

The last two sentences in the foregoing quotation show clearly that the Circuit Court of Appeals labored under the same misapprehensions as to the law, which influenced the United States Attorney to charge identical offenses in different counts appending to these charges additional charges of overt acts thought to be crimes themselves and necessary ingredients of the offense denounced by Criminal Code, Section 19, and that the circumstance of the commission of these overt acts was sufficient evidence, if proven, to sustain a conviction of conspiracy to commit them.

The reliance of the court below upon the return of a verdict of guilty, demonstrates its reluctance to disturb a verdict after a full hearing and trial before a constitutional jury. Petitioner submits that when the verdict is analyzed against the background of the indictment and the charge of the court, it cannot be said with any degree of certainty that the jury found the defendant guilty of conspiracy, and did not confine their consideration to whether or not petitioner and Walker were merely guilty of the overt act charged in the first count, under the erroneous instruction of the court.

In this state of the record petitioner filed a petition for rehearing, renewing the grounds alleged in the trial court. He also made his petition for rehearing a motion for a new trial, raising questions of law. The petition was overruled and the motion was ignored.

SUMMARY OF ARGUMENT.

New Trial.

The right to a new trial is based upon statute (Judicial Code, Section 269) and exists wherever such relief could be had in courts of law. *State* v. *Messino,* 325 Mo. 743, 30 S. W. 2d 750, 755; *Commonwealth* v. *Rollins,* 242 Mass. 427, 136 N. E. 360; *Mattox* v. *United States,* 146 U. S. 140; *Slade's Case,* Style 138; *Wood* v. *Guston,* Style 466; *Ash* v. *Ash,* Comberback 357; *Woodford* v. *Eades,* 1 Strange 425; *Barker* v. *Dixie,* 2 Strange 1051; *Bright* v. *Eynon,* 1 Burrow 390; *Rex* v. *Francis,* 2 Strange 1015.

The decisions of this court do not require the holding that the allowance or refusal of a new trial rests in the sound discretion of the trial court and its action is not subject to review. *Mattox* v. *United States,* 146 U. S. 919; *Haws* v. *Victoria Copper Mining Co.,* 160 U. S. 303, 313; *Spreckels* v. *Brown,* 212 U. S. 208, 215; *Holmgren* v. *United States,* 217 U. S. 509, 521; *Hendrix* v. *United States,* 219 U. S. 79, 91; *McDonald* v. *Pless,* 238 U. S. 264, 268; *Hyde* v. *United States,* 225 U. S. 347, 391; *Jones* v. *Spencer,* 77 L. T. R. 536.

Federal Statutes authorize courts of appeals, as well as trial courts, to entertain motions for new trials as to any matter and to the same extent as where the appellate court could reverse or the trial court could stay judgment upon a verdict. Judicial Code, Section 269 (28 U. S. C. A. 391); Act of January 31, 1928 (28 U. S. C. A. 861a).

While doing ~~lip~~ lip service to the announced rule, most circuit courts of appeals actually grant new trials and review the actions of the trial courts with respect to motions for new trials.

First Circuit:

Katz v. *United States*, 273 Fed. 157.
Lopez v. *United States*, 17 F. 2d 462.

Second Circuit:

Harrison v. *United States*, 7 F. 2d 259, 262.

Third Circuit:

Ogden v. *United States*, 112 Fed. 523.

Fourth Circuit:

Towe v. *United States*, 238 Fed. 557.
Smith v. *United States*, 281 Fed. 696.

Sixth Circuit:

Pugh v. *Bluff City Excursion Co.*, 177 Fed. 399.
Detroit United Ry. Co. v. *Craven*, 13 F. 2d 352.
Tate v. *Baugh*, 264 Fed. 892.
Bates v. *United States*, 269 Fed. 563.

Eighth Circuit:

Paine v. *St. Paul Union Stockyard Co.*, 35 F. 2d 624.
Sulzbacher v. *Continental Casualty Co.*, 88 F. 2d 122.

Ninth Circuit:

Murhard Estate Co. v. *Portland, Seattle Ry. Co.*, 163 Fed. 194.
Smith v. *United States*, 231 Fed. 25.
Beaton v. *United States*, 5 F. 2d 966.
Brown v. *United States*, 9 F. 2d 588.

Tenth Circuit:

Shannon v. *Shaeffer Oil and Refining Co.*, 51 F. 2d 878.

Fifth Circuit:

Bernal v. *United States*, 241 Fed. 339.
Bradley v. *United States*, 264 Fed. 79.
Stokes v. *United States*, 93 F. 2d 744.
Prisament v. *United States*, 96 F. 2d 865.
Jordan v. *United States*, 120 F. 2d 65.
Coplin v. *United States*, (9 Cir.) 88 F. 2d 652.
Casey v. *United States*, (9 Cir.) 20 F. 2d 752.
United States v. *Glasser*, (7 Cir.) 116 F. 2d 690, reversed in part *Glasser* v. *United States*, 315 U. S. 60.

The right to a jury trial includes the right to have the jury correctly instructed as to the law of the case. Constitution of the United States, Amendment Six. *Ex parte United States*, (7 Cir.) 101 Fed. 870, 131 A. L. R. 176.

ARGUMENT.

While the record in this case is small, the questions which might be raised are numerous. However, those which seem to be most appropriate for the attention of this court are the first three set out in the foregoing petition under the Reasons for Allowance of the Writ.

New Trial.

At common law, an accused standing convicted of a misdemeanor might apply for a new trial, but no such remedy was afforded for one convicted of a felony; the remedy in the latter case being to grant a stay during which an application might be made for a pardon. *State* v. *Messino*, 325 Mo. 743, 30 S. W. 2d 750, 755. At the present time in the United States, the occasions, conditions and procedure for new trials in criminal proceedings are generally prescribed by statute. *Commonwealth* v. *Rollins*, 242 Mass. 427, 136 N. E. 360. New trials are authorized in Federal Courts by Judicial Code, Section 269 (28 U. S. C. A. 391), the first sentence of which was taken from the Judiciary Act of September 24, 1789, and reads as follows:

> "All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in courts of law."

The first criminal case decided by this court under the foregoing provision was that of *Mattox* v. *United States*, 146 U. S. 140, in which this court said:

> "The allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed, and the result cannot be made the subject of review by writ of error (*Henderson* v.

> *Moore*, 9 U. S., 5 Cranch 11; *Newcomb* v. *Wood*, 97 U. S. 581) but in the case at bar the District Court excluded the affidavits, and, in passing upon the motion, did not exercise any discretion in respect of the matters stated therein."

For the failure of the trial court to consider the affidavits submitted with the motion, this court reversed and ordered a new trial.

It will be noted that the two cases cited in the Mattox case were both civil cases, and we have been unable to find where either this court or any other Federal Court has made any distinction between civil and criminal cases in the granting or refusal of new trials.

In *Slade's case*, Style 138 (1648), Barron Atkins stayed the judgment upon a verdict because he thought it was wrong, and Bacon, Justice, said that judgments had been arrested in the Common Pleas upon such certificate, but Roll, Justice, held that it ought not to be stayed, for it was too arbitrary and that the only remedy was by writ of attaint. However, several years later, Chief Justice Glyn, in *Wood* v. *Guston*, Style 466 (1655), said that it was in the discretion of the court in some cases to grant a new trial, but that this must be a judicial, and not an arbitrary discretion, and added that it was for the people's benefit that it be so. In *Ash* v. *Ash*, Comberbach 357 (1697), Holt, C. J., granted a new trial because the jury was shy of giving a reason for their verdict, thinking they had an absolute despotic power. In *Woodford* v. *Eades*, 1 Strange 425 (1721), the verdict of the jury was set aside and a new trial granted because of the inadequacy of the awards, this conclusion being inescapable on purely legal principles. However, in *Barker* v. *Dixie*, 2 Strange 1051 (1736), the verdict would not be disturbed notwithstanding it was for merely nominal damages where the amount of the award was within the sole discretion of the jury. Undoubtedly this distinction characterized the law of England on the subject until the decision of Lord Mansfield

in the case of *Bright* v. *Eynon,* 1 Burrow 390 (1757), in which there was a judicial analysis of the verdict on the basis of which a new trial was granted without regard to whether the court was basing its conclusion upon questions of law or upon the broad ground that the jury acted contrary to the weight of the evidence.

While the foregoing cases were all civil matters, their consideration here is thought appropriate, since no distinction is made under Federal Statutes between civil and criminal cases. However, the case of *Rex* v. *Francis,* 2 Strange 1015 (1735), provides an excellent example of the manner in which the rights of an accused were protected by the reservation of questions arising at the trial. The functions of the court in the matter of discerning the law which determines the case from the evidence heard on the trial is best epitomized by Lord Chief Justice Eyre in *Gibson* v. *Hunter,* 2 H. Blackstone 187 (House of Lords, 1793).

Decisions of the Supreme Court of the United States Since the Mattox Case.

It has already been noted that in *Mattox* v. *United States,* 146 U. S. 919, the court said that the allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed. The court did not say that the allowance rested in the discretion of the trial court, as most of the latter decisions state the rule. The Mattox case is cited more often by the various circuit courts of appeals on this proposition, than any other case. However, as has been noted, this court in the Mattox case, reviewed the action of the trial court in excluding affidavits, considering the matter as one of law, and ordered a new trial in the trial court.

The Mattox case is first cited by this court in *Haws* v. *Victoria Copper Mining Company,* 160 U. S. 303, 313, in which the court denied the motion for new trial. The court does not say that the grant or refusal is within the

discretion of the trial court, but says that the contention that the trial court did not consider affidavits was fully answered by the recitals of the order showing that the affidavits were considered, which took the case out of the rule announced in the Mattox case.

The case is next cited by this court in the case of *Spreckels* v. *Brown*, 212 U. S. 208, 215, where the court disposed of objections to the procedure of the trial court in denying a motion for new trial by pointing out that the order overruling the motion was right on other grounds.

The first case citing the Mattox case and announcing the "sound discretion of the *trial* court" rule is *Holmgren* v. *United States*, 217 U. S. 509, 521. It does not cite the Mattox case for this proposition, but relies upon several civil cases for this expansion of the rule. However, the critical language is coupled with the statement "and its action in that respect cannot be made the basis of review by writ of error from this court."

No objection can be made to the statement that "the allowance or refusal of a new trial rests in the sound discretion of the trial court," nor that "its action in that respect cannot be made the basis of review by writ of error." The authority granted by Judicial Code, Section 269, to "all United States courts" is to grant new trials where they have usually been granted in the courts of law. Cf. *Jones* v. *Spencer*, 77 L. T. R. 536 (H. of L., 1898). The power must exist on appeal, whether the error be one originally assigned, made the basis of a new motion, or be noticed by the court.

The next citation of the Mattox case by this court is *Hendrix* v. *United States*, 219 U. S. 79, 91. In that case this court affirmed the action of the trial court in denying the motion for new trial based on an affidavit of a witness impeaching the verdict touching a matter which had been held improper in the Mattox case.

In *McDonald* v. *Pless*, 238 U. S. 264, 268, the Mattox case is cited as an instance in which evidence was re-

ceived that the jury acted improperly. The case also cites the majority opinion in *Hyde* v. *United States,* for the proposition that the jurors may not impeach their verdict. The Hyde case being a criminal prosecution for conspiracy, the dissenting opinion of Mr. Justice Holmes may be of interest. In it, he says (225 U. S. 391):

> "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."

This observation seems apropos at this time in connection with the oft repeated statement that a motion for a new trial rests in the sound discretion of the trial court, and its action may not be questioned on review.

Under Federal Statutes.

It will hardly be disputed that the purpose of Judicial Code, Section 269, was to preserve all of the substantial rights of a defendant which theretofore had been protected by a motion for a new trial in a court of law. However, the courts of law created by Federal Statutes in the United States differed, in many respects, from the courts of law previously existing in England and in the various states. There was little reason for the exercise of power by an appellate court to review the action of the lower court by writ of error where the effect of the writ of error, if sustained, would be to obtain a new trial or the acquittal and discharge of the defendant. Moreover, under the practice of the King's Bench, when a special verdict was returned and the Judge or Court reserved ruling and the entry of judgment, the judgment to be entered would be the result of the consideration of the full court, unless the judges decided that the verdict would not support a judgment, in which case the defendant was discharged or a new trial ordered. In any event, if the indictment, the charge of the court and the verdict, when construed together, left doubt as to whether or not the jury had found on sufficient evidence that the accused

was guilty of the offense charged in the indictment, no final judgment of conviction and sentence could be entered. If such doubts should arise, instead of supporting the verdict and authorizing the reviewing courts or judges to say that the final judgment was proper, they required the stay of judgment and further proceedings.

The act of January 31, 1928 (28 U. S. C. A. 861a), provides that

> "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

Although the term "appeal" is often given various meanings, and is sometimes broadly used to designate any proceeding for review, in its technical and limited sense it means a proceeding for review by which the whole case is transferred to a higher court for a trial *de novo* and independent final determination. Our constitutional guaranties, as well as certain statutory inhibitions, make clear that the substitution of appeal for writ of error did not contemplate trial anew of questions of facts in our courts of appeal. However, there is no limitation upon the power of the court to afford new consideration to questions of law which arise on the record. The only limitation in this respect seems to be the inclination of the courts to entertain.

The sufficiency of the evidence to sustain a verdict of guilty in a criminal case is clearly a question to be determined by the court, and not the jury. While the scales may be so evenly balanced that the court cannot determine the sufficiency except on the basis that the jury has found in one direction or the other, if such a situation arises, it is essential to know that the verdict speaks the finding of the jury upon the precise problem to be determined in settling the litigation. It, therefore, becomes necessary to

relate the consideration of the matter to the situation of the court of the King's Bench where judgment has been stayed on the return of a special verdict.

In the present case, if the Court of Appeals would be influenced by the fact that the jury found the defendant guilty on the first count, it must not overlook the fact that the jury said that the defendant was not guilty on the second count, for that was also a necessary consequence of its action. The court must read from the verdict when projected against the background of the charge of the court, the exact language of that part of the first count of the indictment which precedes the semicolon as mentioned in the Statement of Facts. The considerations which preclude the grant of a new trial by the Appellate Court do not differ from those which preclude the reversal of a failure to direct the verdict, the admission or exclusion of evidence, the grant or denial of a continuance, or a finding of facts where the Judge is the tryer.

Circuit Court of Appeals Decisions.

The Circuit Court of Appeals decisions relating to motions for new trials are almost too numerous to enumerate, or to exhaust even when confined to those which cite the Mattox case. However, a few are considered in the next few paragraphs.

In *Katz* v. *United States*, 273 Fed. 157, the First Circuit Court stated that

> "It has only been in cases where the trial judge has refused to exercise his discretion and to consider the motion and affidavits offered in its support that his ruling has been reviewed, as in *Mattox* v. *United States* * * *."

This case was followed in *Lopez* v. *United States*, (1 Cir.) 17 F. 2d 462.

The Second Circuit, in *Harrison* v. *United States*, 7 F. 2d 259, 262, said,

> "Under authorities too numerous to mention, we should have no jurisdiction to review a decision of this motion, however erroneous. But it is equally well settled that, if the Judge declined to entertain the motion at all, the defendant is deprived of a right to which he is entitled. *Mattox* v. *United States.* * * *"

The record in this case showed that the trial court supposed that the recantation of a witness could not be ground for a new trial, and that this was his only reason for refusing to consider the motion. Finding this to be erroneous, the Second Circuit reversed and remanded, with direction to consider the motion. Here we have a clear case of a review of the action of the trial court on a motion for new trial on questions of law.

The Third Circuit, in *Ogden* v. *United States,* 112 Fed. 523, stated that the denial or grant of a new trial was within the sound discretion of the court, but that the court must exercise its discretion, and a failure to do so would be reversible error. In that case the motion set out that the jury took the indictment with it when it retired for its deliberations. Verdicts of guilty rendered at a former trial were endorsed on the back of the indictment. Citing the Mattox case, the court found that the trial Judge had failed to exercise his discretion and remanded the cause for a new trial. (Query: What would have been the conclusion of the Court of Appeals if the trial court had exercised its discretion and denied the motion for a new trial?)

In the Fourth Circuit the situation seems to be somewhat confused. In *Towe* v. *United States,* 238 Fed. 557, the court reiterates the hackneyed talisman of discretion not subject to review upon writ of error, and cites numerous cases. However, in *Smith* v. *United States,* 281 Fed. 696, the doctrine is first announced in all its vigor. Thereafter the court says,

> "These immunities from review, as respect the original motion for a new trial and a motion based upon after-discovered evidence, are predicated upon the court's having reached a correct conclusion as to the facts, and of its having given proper consideration to the affidavits offered in support of the new trial."

The court then proceeds to consider the affidavits and the motion, and concludes that the court could not possibly have reached a correct conclusion as to the facts, and itself awards a new trial. The similarity of that case to the one at bar is striking. The facts which compelled the Court of Appeals to grant the new trial were that the jury had acquitted on the fourth and fifth counts and convicted on the sixth. The court found that if the jury believed the defendant not guilty on the fourth and fifth counts, it necessarily believed him not guilty on the sixth count; and held that in this state of the record the conviction could not be allowed to stand.

In *Pugh* v. *Bluff City Excursion Co.*, 177 Fed. 399, the Sixth Circuit apparently began an excursion of its own away from the trend of the decisions. In that case it said,

> "It is the general rule that the granting of a new trial is a matter of discretion and will not be reviewed. But it is not so where the verdict is inconsistent on its face and shows the abuse of power on the part of the jury. If the granting of the motion is positive duty, it is not discretionary. If it is necessary to correct a mistrial, it becomes a positive duty to set aside the erroneous proceedings and grant a new trial."

While the case of *Detroit United Ry.* v. *Craven*, (6 Cir.) 13 F. 2d 352, is distinguishable on its facts the trend of decisions by this circuit did not follow the Pugh case. *Tate* v. *Baugh*, 264 Fed. 892, *Bates* v. *United States*, 269 Fed. 563.

In *Paine* v. *St. Paul Union Stockyard Co.*, 35 F. 2d 624, the Eighth Circuit repeats the stock phrases but notes that the trial court has the power to grant a new trial where all of the evidence was not introduced by the moving party because of belief that the evidence already introduced was sufficient. This view is expanded in *Sulzbacher* v. *Continental Casualty Co.*, 88 F. 2d 122, where the motion for a new trial presented a new contention as to the law of the case. The theory advanced in support of the motion was contrary to the contentions of counsel on both sides when the case was tried, as well as with the views then entertained by the court. The trial court would not establish the precedent of entertaining such motion after the trial, but the Circuit Court of Appeals reversed.

The Ninth Circuit felt bound by the decisions of this court in *Murhard Estate Co.* v. *Portland, Seattle Ry. Co.*, 163 Fed. 194, 196, and held that although the ground urged was proper for a motion for new trial, the determination rested in the sound discretion of the trial court and could not be reviewed. However, in *Smith* v. *United States*, 231 Fed. 25, it was held that the court would review to the extent of determining whether or not the trial court considered all of the evidence offered in support of the motion. See also *Beaton* v. *United States*, 5 F. 2d 966, and *Brown* v. *United States*, 9 F. 2d 588.

The Tenth Circuit, in the case of *Shannon* v. *Shaeffer Oil & Ref. Co.*, 51 F. 2d 878, stated that an order overruling a motion for a new trial was not an appealable order, citing *Luckenbach SS Co.* v. *United States*, 272 U. S. 533, and *Regan* v. *Akin*, 130 U. S. 109. Here we have a paraphrasing of the usual formula, but the interesting point in this case is that neither of the authorities cited is in point.

Fifth Circuit Court of Appeals Cases.

In *Bernal* v. *United States*, 241 Fed. 339, the court said,

> "It is elementary that the granting of a new trial is within the sound discretion of the court, and error cannot be predicated upon a refusal."

And again, in *Bradley* v. *United States,* 264 Fed. 79, the Fifth Circuit said that,

> "The refusal or granting of a motion for a new trial is in the sound discretion of the trial judge and cannot be reviewed upon writ of error or appeal." Citing *Mattox* v. *United States.*

It would seem that these two cases would establish a formula for the Fifth Circuit. However, in *Stokes* v. *United States,* 93 F. 2d 744, Judge Hutchison (who did not sit in the case at bar) reviewed the showing made in support of a motion for new trial, and found from the entire record that there had been no prejudicial error.

In *Prisament* v. *United States,* 96 F. 2d 865, Judge Holmes (who did not sit in the case at bar) would not follow the earlier cases from the Fifth Circuit. Instead, he cites one case from the Ninth Circuit in which no authorities are cited (*Casey* v. *United States,* 20 F. 2d 752, Certiorari denied 276 U. S. 413). It should be noted that the Casey case applies a rationale to the ruling of the court under the oft repeated statement that the granting or refusing of a new trial is within the sound discretion of the court. The only other Fifth Circuit Judge who participated in the decision of this case who remains on the bench, is Judge Sibley, who filed a dissenting opinion in the case at bar. Not only does the opinion in the Prisament case ignore the former decisions of the Fifth Circuit, as well as the Mattox case, but it passes the question of the reviewability of the action of the trial court and demonstrates conclusively that the action of the trial court was correct under well recognized legal principles.

In *Jordan* v. *United States,* 120 F. 2d 65, Judge McCord (Judges Sibley and Holmes concurring) gave full

consideration to the grounds alleged for the motion, but did not cite any decision of the Fifth Circuit (not even the Prisament case), relying instead upon *United States* v. *Glasser*, (7 Cir.) 116 F. 2d 690; *Coplin* v. *United States*, (9 Cir.), 88 F. 2d 652; *Casey* v. *United States*, (9 Cir.) 20 F. 2d 752; the last case being the one relied upon in the Prisament case. The Glasser case has been reversed by this court. *Glasser* v. *United States*, 315 U. S. 60; and in the Coplin case the motion was fully considered by the court of appeals.

Thus, it appears, although the Fifth Circuit has not attempted any modification or refinement upon the accepted formula for disposing of motions for new trial, none of the four judges named is in full sympathy with the rule, as most frequently announced and is willing to base his decision upon any of the cases which follow orthodox lines.

Petitioner submits that in view of the substitution of appeals for writs of error and the ambiguous state of the jurisprudence upon the subject of new trials, this court should re-examine the principles announced in the Mattox case and redefine the powers and functions of the trial court and the courts of appeal on motion for new trial.

Right to Have the Law Correctly Stated to the Jury.

As has been pointed out, a grievous error was committed in charging the jury. In *Ex parte United States*, (7 Cir.) 101 F. 2d 870, 131 A. L. R. 176, it was said that the right to trial by jury given by the Sixth Amendment to the Constitution restrains the lay jury to the limited and special role of determining controverted facts to the same extent that the Judge is prevented from invading the province of the jury. The right to have a trial by jury includes the right to have a jury properly charged as to the law governing the case, and a denial of the one would be as grievous as the denial of the other. Peti-

tioner submits that he has been prejudiced by grievous error.

CONCLUSION.

Petitioner respectfully submits that the questions presented upon this petition are of great importance, not only to himself, but to every citizen of the United States. It is a strange quirk of fate which brings him to the Bar of this Court to complain that he has been denied rights secured to him by the United States while he stands convicted of a conspiracy to deprive another of such rights. The question with him is, whether or not the sovereign will do to him, with impunity, that which he is charged with conspiring to do to another, for which conspiracy he stands condemned to the severe penalty which the law exacts.

Respectfully submitted,

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549498—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 196

WILLIE GRAY GARRISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The majority (R. 151–154) and dissenting (R. 154) opinions in the circuit court of appeals are not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered May 28, 1943 (R. 154). Petitioner's two petitions for rehearing (R. 155–158, 159–166) were denied June 25, 1943 (R. 172). The petition for a writ of certiorari was filed July 23, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as

amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether, upon the trial of petitioner and another for conspiracy in violation of Section 19 of the Criminal Code, the trial judge in his instructions submitted the case to the jury on the erroneous theory that the issue for their determination was whether the defendants oppressed, threatened, or intimidated the victim of the alleged conspiracy.

STATUTE INVOLVED

Section 19 of the Criminal Code, 18 U. S. C. 51, provides in pertinent part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, * * * they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

STATEMENT

Petitioner and one Earliest Walker were indicted on September 18, 1942, in the District Court

for the Northern District of Alabama in two counts, each charging a conspiracy in violation of Section 19 of the Criminal Code (R. 2–5). The first count alleged that on or about May 9, 1942, the defendants, together with other persons unknown to the grand jury, conspired to injure, oppress, intimidate, and threaten J. G. Dorough, a citizen of the United States, in the free exercise of his right and privilege to inform public officers of the United States of a violation of the laws of the United States, and that in pursuance of the conspiracy and to effect the object thereof the defendants, on or about May 9, 1942, threatened, cursed and otherwise ill-treated Dorough because he had informed investigators of the Alcohol Tax Unit as to the location of an illicit distillery and had reported to them the activities of various persons, including the defendants, allegedly connected with and engaged in the illicit liquor business in Sumter and Choctaw Counties, Alabama (R. 2–4). The second count alleged a conspiracy "at the time and place aforesaid" and was in similar terms, except that it averred that on or about May 11, 1942, in pursuance of the conspiracy and to effect the object thereof, the defendants assaulted Dorough by shooting at him and cursed, threatened, and otherwise ill-treated him because he had given information to investigators of the Alcohol Tax Unit, as alleged in the first count (R. 4–5).

The evidence adduced by the Government at the trial of the defendants before a jury showed as follows:

Petitioner and others were engaged in the manufacture of illicit liquor (R. 18–20, 21–22, 23–24, 65–67). On numerous occasions prior to May 1942 the defendant Walker had been seen in the company of petitioner in petitioner's truck and around his home, as well as in the woods (R. 66). Dorough informed Government agents of the location of an illicit distillery, of the activities of petitioner and others in connection with its operation, and of Walker's associations with petitioner (R. 21–22, 23–25, 65–66).

The agents raided the distillery and later arrested petitioner and three others on charges of operating it (R. 18–19, 78). About two weeks after the arrest, on May 9, 1942 (see R. 27–28), petitioner accosted Earl Brunson, who was employed by Dorough. Petitioner accused Brunson of obtaining information concerning petitioner's illegal activities from petitioner's employees and furnishing that information to Dorough, who in turn supplied it to the agents, and he threatened that if Brunson did not cease the practice and leave Dorough's employ and the community he would kill him. (R. 36–39, 54–57.)

In the evening of the same day Dorough drove Earl Brunson to the latter's home, where he lived with his parents. A few minutes after they

arrived there petitioner and Walker drove up in petitioner's truck. (R. 27–28, 46–47, 57, 59, 67.) Petitioner, carrying a flashlight and pistol, walked over to Dorough, shined the light in his face, placed the pistol under his chin, and told him that "he was meddling in his business and if he didn't stop it he would kill him" (R. 28–30, 47–51, 60–61, 67–71). Petitioner told Dorough "not to flip his lips any more, he would blow his eyes out" (R. 40), that "he was a good mind to blow his God Damn brains out" (R. 49), that "I am going to kill you" (R. 69), and that he was going to burn Dorough out because he had informed on him (R. 70). Petitioner and Walker then left the premises together (R. 33). Later that night, as petitioner and Walker were driving past the Brunson home, Brunson's mother hailed them and told petitioner that she did not think Earl had meddled in his business and that she did not want Earl to leave home. Walker was sitting in the truck holding a rifle; he stated that "Didn't nobody do it but Son" (Earl Brunson), and that "Son was toteing news to Mr. Dorough." Walker then got out of the truck with a pistol in his hand and left the premises on foot. (R. 31–33.) Early the next morning, May 10, Walker, accompanied by his brother and another man, obtained some money from his farmer employer and said that they were going to Birmingham (R. 103–104).

On the night of May 10 some unidentified person shot at Dorough five or six times with a pistol as he was getting out of his truck at his home (R. 71–72). On May 11 petitioner again returned to the Brunson home seeking Dorough (R. 52).

At the conclusion of all the evidence the defendants moved for a directed verdict; the motion was denied (R. 11). The jury found both petitioner and Walker guilty on count one, but they made no finding in respect of count two (R. 11). Petitioner's motion to set aside the verdict and for a new trial (R. 14–15) was denied (R. 11–12), and he was sentenced to imprisonment for five years and to pay a fine of $1,000 (R. 12–13).

On appeal the court below affirmed the conviction, one judge dissenting as to the sufficiency of the evidence to establish a conspiracy between the two defendants (R. 151–154). On June 16, 1943, petitioner filed a petition for rehearing (R. 155–158) and on June 18, 1943, a second petition for rehearing, together with a motion for new trial (R. 159–171).[1] On June 25, 1943, the court below entered its order denying "the petitions for rehearing" (R. 172).

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[1] The second petition for rehearing and motion for a new trial apparently resulted from the fact that petitioner retained new counsel after the first petition was filed (see R. 158, 171).

ARGUMENT

Petitioner asserts, primarily as laying a foundation for his principal contention that the circuit court of appeals had jurisdiction to entertain his motion for a new trial and erred in not passing upon it, that an error of law pervaded the entire proceedings in the trial court and as a result he was convicted, not for conspiracy as alleged in the indictment, but for an act which was not an offense. His underlying premise is based upon a chain of reasoning which runs as follows: The indictment was drawn and the trial judge instructed the jury on the erroneous theory that an overt act is a "necessary element" of the offense of conspiracy denounced by Section 19 of the Criminal Code; the judge also erroneously instructed the jury that "The question for you to determine is, did these defendants or either of them, oppress or threaten or intimidate Mr. Dorough because of his having reported the activities of the defendant in the whiskey business" (R. 112), and thus authorized the jury to convict if they found that petitioner or Walker committed the "overt acts" charged in the indictment; and since each count charged the same conspiracy and "The jury convicted as to Count One, but acquitted as to Count Two" their verdict must, under the trial judge's instruction quoted above, be interpreted as an acquittal on the charge of conspiracy and a finding only that

the defendants oppressed, threatened, and intimidated Dorough as alleged in the first count, but not as alleged in the second (Pet. 1–2, 6, 7, 10, 13). Petitioner's conclusion is without justification.

Although, as petitioner points out, the two counts alleged the same conspiracy and differed only in the allegations of acts done "in pursuance of * * * [the] conspiracy, * * * and to effect the object thereof" (R. 3, 5), this, of course, was permissible. Cf. *United States* v. *Anderson*, 101 F. (2d) 325, 333 (C. C. A. 7), certiorari denied, 307 U. S. 625. Moreover, the jury was told that only one conspiracy was involved. At the conclusion of the trial judge's charge, petitioner's counsel requested him to "let the Jury understand that both counts are based on an alleged conspiracy." The judge said that this was so, but that "they are separate constructions," and added: "Of course, Gentlemen, they are both based on a conspiracy as I said in the beginning of my charge. Count one charges conspiracy and count two charges it. In other words, the only difference between those counts is the difference in the date. They are on different dates as to the time of the alleged overt acts that were supposed to have been committed." Counsel agreed to this as a correct construction of the two counts. (R. 117–118.) In view of this instruction and the fact that petitioner was convicted and sentenced on only the first count (R.

12–13), he is in no position to assert that he was tried on an erroneous theory of a single conspiracy constituting a plurality of offenses according to the number of its objects. Compare *Braverman* v. *United States*, 317 U. S. 49; *United States* v. *Anderson, supra.*

Nor is it material that the indictment charged (R. 3–4, 5), and the trial judge's instructions required the jury to find (in addition to the existence of the alleged conspiracy) (R. 114–115), that overt acts were committed to effect the object of the conspiracy. The offense under Section 19 of the Criminal Code is the conspiracy; it is only necessary to allege and prove that two or more persons conspired to injure, intimidate, threaten, or oppress a citizen of the United States in the free exercise or enjoyment of a right or privilege secured to him by the Constitution or laws of the United States. *Walker* v. *United States*, 93 F. (2d) 383, 387 (C. C. A. 8), certiorari denied, 303 U. S. 644, 668; *Montoya* v. *United States*, 262 Fed. 759, 760 (C. C. A. 8). Allegation and proof of an overt act in furtherance of such a conspiracy are wholly unnecessary (*Smith* v. *United States*, 157 Fed. 721, 725 (C. C. A. 8), certiorari denied, 208 U. S. 618), and to this extent Section 19 differs from Section 37 of the Criminal Code (18 U. S. C. 88), which interdicts conspiracies to commit offenses against the United States or to defraud it, but requires an overt act. *United States* v.

Ellis, 43 F. Supp. 321, 325 (W. D. S. C.). However, if an overt act is alleged in an indictment laid under Section 19, it may be considered as merely describing or particularizing the conspiracy charged. *Smith* v. *United States, supra; United States* v. *Ellis, supra.*

We may grant that the trial judge misstated the applicable law in instructing the jury that before they could convict they must find not only that a conspiracy existed, but also that the defendants, or one of them, "did an overt act to effect the agreement or carry it out" (R. 114–115). But this instruction required the Government to prove and the jury to find more than Section 19 requires. Petitioner was, consequently, favored by it.

In the final analysis, therefore, petitioner's basic contention rests solely upon the single statement in the judge's instructions to the effect that the question for the jury was whether the defendants had oppressed, threatened, or intimidated Dorough because he had reported their illegal activities (R. 112). This statement, considered out of its context, indicates that the jury was permitted to convict if they found only that the defendants, or either of them, committed any of the acts mentioned. But a reading of the charge as a whole [2] readily shows that the issue of the de-

[2] It is settled, of course, that the trial court's charge to the jury must be considered in its entirety and if, when so con-

fendants' guilt or innocence of the conspiracy charged was properly submitted to the jury. Thus, at the outset of his charge the judge explained that the offense denounced by Section 19 of the Criminal Code is conspiracy to injure, oppress, threaten, or intimidate a citizen in the exercise of his rights or privileges under the Constitution or laws of the United States, and he added that "It is also unlawful" to injure or oppress a citizen "who has exercised" such rights or privileges (R. 112).[3] This was followed by the statement of which petitioner complains. Shortly thereafter, however, the judge explained that the two counts of the indictment each charged a conspiracy (R. 112–

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sidered, it is not subject to misconstruction, isolated erroneous statements furnish no basis for a claim of reversible error. *Graham* v. *United States*, 120 F. (2d) 543, 546 (C. C. A. 10); *Martin* v. *United States*, 100 F. (2d) 490, 497 (C. C. A. 10), certiorari denied, 306 U. S. 649; *United States* v. *McCann*, 32 F. (2d) 540, 542 (C. C. A. 2), certiorari denied, 280 U. S. 559; *Haggerty* v. *United States*, 5 F. (2d) 224, 226 (C. C. A. 7); *Colt* v. *United States*, 190 Fed. 305, 308 (C. C. A. 8), certiorari denied, 223 U. S. 729; *Horn* v. *United States*, 182 Fed. 721, 740 (C. C. A. 8), certiorari denied, 219 U. S. 585; see also *United States* v. *Schenck*, 126 F. (2d) 702, 708 (C. C. A. 2), certiorari denied *sub nom. Moskowitz* v. *United States*, 316 U. S. 705; cf. *Mills* v. *United States*, 164 U. S. 644.

[3] Petitioner says that by this latter instruction the jury were told that the object of the alleged conspiracy was itself an offense (Pet. 1–2). It is clear, however, that the judge was alluding to the portion of Section 19 which makes it an offense to conspire to injure or oppress a citizen because of his *having exercised* a right or privilege secured to him.

113). He then expounded to the jury the nature of a conspiracy and told them that they were to determine whether there was an unlawful agreement from the circumstances and facts in the case (R. 113). In later portions of his charge the judge twice explicitly instructed the jury that they were to determine two questions: first, whether the defendants entered into the unlawful agreement, and second, whether either of them committed an act to effectuate its purpose (R. 114–115).[4] Finally, at the specific request of petitioner's counsel, the judge reiterated that both counts were "based on a conspiracy" (R. 117-118). There were no other requests for instructions and no exceptions to the charge (see R. 118).

Although the particular language challenged by petitioner was erroneous, it can scarcely be said that the jury was misled into the belief that the sole issue was whether the defendants committed overt acts of oppression against Dorough. To the contrary, the charge as a whole made it clear to the jury that they could convict only if they found that the defendants entered into a conspiracy as charged in the indictment.[5]

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[4] As we have shown (*supra*, pp. 9–10), this latter instruction, although not a correct statement of the applicable law, actually favored petitioner.

[5] Petitioner's ingenious argument that as a result of the challenged instruction the jury's verdict must be interpreted as a finding merely that the defendants committed the overt act alleged in the first count (see pp. 7–8, *supra*), is fallacious.

There is consequently no basis for petitioner's contention that because of an error of law pervading his trial he was not convicted for conspiracy, but for affirmative acts which do not constitute an offense under Section 19 of the Criminal Code or any other law of the United States. The circuit court of appeals, therefore, did not err in refusing to order a new trial on that ground, as urged in petitioner's motion for a new trial in that court (R. 166–169). Despite petitioner's assertion that the court declined to entertain his motion, it is clear that the court took

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The jury did not acquit the defendants on the second count, as petitioner says (Pet. 2). Their verdict was silent as to that count (R. 11), and if we may speculate as to the reason for their failure to return a verdict on it, it may properly be explained on the ground that there was no positive proof as to the identity of the assailant who fired at Dorough on the night of May 10, 1942 (see p. 6, *supra*). The second count alleged that the defendants shot at Dorough on May 11, and although this discrepancy was not material, the jury was apparently not satisfied that the defendants, or either of them, did the shooting.

Petitioner also asserts, without supporting argument (Pet. 3–4), that the trial judge erroneously charged that the evidence showed that Dorough was a citizen of the United States (R. 112). Although Dorough did not testify directly that he was a citizen, he stated that he lived in Sumter County, Alabama (R. 62; see also R. 21). A person is presumed to be a citizen of the country in which he resides until the contrary is shown. *Hoffman* v. *United States*, 68 F. (2d) 101, 103 (C. C. A. 10); *Wallerstedt* v. *Trank*, 146 Minn. 230, 232, 178 N. W. 738 (1920); *State* v. *Jackson*, 79 Vt. 504, 509, 65 Atl. 657 (1907). Dorough's citizenship was not disputed and there was no objection to the judge's instruction in this regard.

cognizance of his contention that he was convicted on an erroneous theory of law, for the identical contention was presented to the court in his second petition for rehearing which accompanied the motion (R. 159–165), and the court specifically denied both of his petitions for rehearing (R. 172).[6]

CONCLUSION

The petition presents no question of importance, and no conflict of decisions is involved. We therefore respectfully submit that it should be denied.

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Special Assistant to the Attorney General.
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Attorney.

SEPTEMBER 1943.

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[6] Petitioner asserts (Pet. 3) that the evidence was insufficient to support the verdict and asks that this Court consider its sufficiency (Pet. 8), but he does not argue the point. The majority and dissenting judges in the court below reached opposite conclusions as to the sufficiency of the evidence to establish a conspiracy between the two defendants. This very fact plainly shows that the issue was peculiarly one for the jury. It would seem, therefore, that the jury's verdict should be deemed conclusive. In any event, the evidence adduced by the Government, which we have summarized in the Statement (*supra*, pp. 4–6), was, we submit, amply sufficient to make out a case for the jury.

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In The
Supreme Court of The United States

OCTOBER TERM, 1943

NO. 196

WILLIE GRAY GARRISON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Petitioner is indebted to counsel who prepared the brief in opposition for a fair and correct statement of the legal principles relied upon by respondent; and for the only consideration to date, either judicial or administrative, which takes into account the provisions of the statute under which he was convicted.[1] However, petitioner had hoped that such a consideration would lead the Solicitor General to confess error and join in the prayer of the petition. An examination of the brief leads to the conclusion that what was set forth in the petition and said in support thereof was not sufficiently explicit, with the result that opposing counsel have failed to reach the real questions presented, or to answer the propositions relied upon.

[1]Judge Sibley's dissenting opinion (R. 154, 135 F. 2d. 877, 878) is based upon the entire lack of evidence of conspiracy; and his position is equally sound under Criminal Code Section 19 or Section 37.

QUESTION PRESENTED

Petitioner pointed out ten questions properly addressed to the consideration of this court (P. 5-7), none of which were thought to overlap; while respondent states only one question which, as stated, is not germane to any of petitioner's ten, and is not of the character and type to be noticed by this court, but should be left to the final determination of the intermediate court of review. If the question presented here is whether the trial court submitted the case to the jury on the erroneous theory that the question for its determination was whether or not the defendants ("or either of them") oppressed, threatened or intimidated the victim, as stated (Br. 2); then respondent admits that it was so charged, and the argument is such as to, and should, invoke the second sentence of Judicial Code Section 269 (28 U.S.C.A. 391). Since petitioner filed his motion for a new trial in the trial court (R. 14), assigned error on appeal for its denial (R. 121 123(13)), and renewed the motion in the Court of Appeals assigning additional grounds raising questions of law; the question presented here can best be formulized as follows:

> On the record presented here, should the Circuit Court have entertained or reviewed the proceedings on the motion for a new trial, under the first sentence of Judicial Code Section 269; or should it have affirmed, as contended by respondent, or reversed and ordered the defendants discharged, as contended by petitioner, either of the latter results being under the second sentence of Judicial Code Section 269?

STATUTE INVOLVED

Section 269 of the Judicial Code (28 U.S.C.A. 391) provides as follows:

"All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

STATEMENT

Notwithstanding the erudition and attitude of fairness manifest in respondent's brief in opposition, counsel, like the jury, the trial court, and Circuit Court of Appeals, appear to have been misled by the course and conduct of the proceedings. It is stated (Br. 4) that petitioner was engaged in the manufacture of illicit liquor. Whatever the facts may have been, the record does not sustain this assertion. Petitioner was not on trial for this charge, but the jury, the trial court, the Court of Appeals, and now the Solicitor General of the United States assume it to be true, as the background for a civil rights conspiracy, on the following circumstances:

1. An agent from Mobile, Alabama, and an agent from Meridian, Mississippi, destroyed a still in Choctaw County, Alabama, about three miles from petitioner's premises in Sumter County, Alabama, and arrested petitioner and charged him with it (R. 18-20). (Note that Choctaw County is in the Southern District of Alabama, while Sumter County is in the Northern District, (28 U.S.C.A. 142)).

2. The victim (J. G. Dorough) gave information to agents from Tuscaloosa, Alabama, while in Sumter County (all in the Northern District, R.2) that petitioner was engaged in certain acts

constituting liquor violations; but when the agents undertook to verify some of this information, they were unable to do so. (R. 21-22, 23-24).

3. The alleged victim (J. G. Dorough) testified at the trial to the particulars of the information given by him to agents, and also gave primary evidence (testimony) to the circumstances which led him to believe the information true, but which circumstances, if true, did not negative reasonable hypotheses other than that petitioner was engaged in the manufacture of illicit liquor. (R. 65-67.)

The probative force, either as to the manufacture or conspiracy, of the first of these circumstances is not apparent. The second adds nothing to the third. The third is the unverified suspicion of one individual based on circumstances which do not add to their weight. Thus, petitioner has been compelled to contend for his right to liberty under the stigma of belief by all who were so positioned as to be able to afford relief, that he was engaged in large operations involving commercialized violations of the Revenue Laws. He could not defend against this belief, because he was not charged with that offense. He could not disprove the charge, because no attempt was made to prove it against him. Although irrelevant, now it is asserted an accomplished fact.

Respondent states (Brief 4) that on numerous occasions the defendant Walker had been seen in the company of petitioner in petitioner's truck and around his home, as well as in the woods. The record cited in support (R. 66) reads as follows:

> "Sometimes when Garrison passed my house there was somebody with him. These people were Earliest Walker and P. G. Walker — they were brothers. I do not know whether Earliest Walker worked for Garrison or not, and I do not know what

he was doing riding with him. I have seen Earliest Walker around Garrison's home and have seen him in the woods with Garrison. He was just working in the woods."

Apparently, in Respondent's lexicon "sometimes" is synonymous with "on numerous occasions". Apparently this testimony is relied upon to defeat the concise analysis and clear conclusion announced in the dissenting opinion (R. 154). However, if Dorough's testimony be given its greatest weight, it proves too much.

If petitioner was engaged as testified, and was disposed to oppress and intimidate even the white men believed to be associated with agents clothed with the authority of the Federal Government; it is hardly believable that he would pause to conspire, confederate or agree with the negro alleged to be closely associated with and employed by him, and also sometimes suspected of being associated in the manufacture of illicit liquor. Walker's acquiescence would not have been by agreement but by compulsion. Even the alleged statements with reference to Earl Brunson (R. 32), which could have no relation to Dorough, would have been made in fear that he must anticipate "his white man's" wishes.

With so much of pretext and assumption, cannot this court pierce the veil of judicial fiction, and the fog of professional etiquette; and view the facts, either as they are or as they must be confined for purposes of review? Petitioner and Dorough both lived in Sumter County, in the Northern District of Alabama. Dorough furnished much information to agents of the Alcohol Tax Unit designed to result in the arrest and conviction of petitioner on a charge of violating the liquor laws. These agents were unable to verify this information. Agents from Mobile and Meridian destroyed a still over the line in Choctaw County, in the Southern District of Alabama. This still proves to be only three miles

"from the premises" of petitioner. On the information furnished by Dorough, petitioner was arrested for this still. If guilty, he should have been prosecuted in the Southern District. Whether he was or not, the record does not show.

If petitioner was guilty of transporting liquor to Meridian, in the Southern District of Mississippi, from the still in the Southern District of Alabama; and of transporting materials to the still on his return, and on these trips, passed Dorough's house in the Northern District of Alabama at a high and reckless rate of speed; he could have been prosecuted for these offenses in all or either of these districts, and the prosecutors could have multiplied counts and offenses to their complete satiation.

Instead of prosecuting petitioner on liquor charges, either in the district where he is charged with manufacture, or in the district where it is suspected by Dorough that he sells; a charge of conspiracy is laid in the third district, and with him is joined a negro who fortuitously was with him on the date alleged. More prejudice is injected against him by testimony (by Dorough) that he associated with negroes. Testimony is introduced to prove an overt act, but none to show conspiracy. A heinous overt act is proved to the satisfaction of the jury by the testimony of Dorough, others suspected of liquor violations and their relatives. There is no evidence of participation by the negro Walker, but this should be no deterrent to the jury, if it appears that they can not convict one without the other. If any juror had misgivings about Walker, they could be allayed by assurances from others that the negro was just a tool in the white man's hands; and then, too, would not a conviction under this statute disfranchise him and render him ineligible for a place of honor, profit and trust? For agents and prosecutors intent on vendicating themselves on the vast amount of "evi-

dence" furnished by Dorough, which the agents and prosecutors in the Southern Districts of Alabama and Mississippi had failed to use successfully, the case was ideal for the use of a negro as a "dummy defendant". The negro would be compelled to rely upon the white for aid in his defense, and the more cooperation they displayed, the stronger the suspicion of conspiracy would grow in the minds of the jury. Dorough would testify to numerous occasions when he gave voluminous information. Each bit would appear to be additional provocation to petitioner. Soon the apparent provocation would amount to proof of the act in the minds of the jury. The only element lacking would be proof of conspiracy, and the case might have failed on this point, except for the charge of the court, which respondent admits is erroneous.

ARGUMENT

Respondent concedes the following propositions set forth in the petition and in support thereof:

1. That the indictment was drawn on an erroneous theory of law (Br. 8-9).

2. That both counts of the indictment charge one and the same conspiracy (Br. 8).

3. That the court submitted to the jury the question of whether or not overt acts had been committed, and that this portion of the Court's charge, considered alone, made this question the sole issue in the case. (Br. 7).

4. That the charge to the jury was erroneous (Br. 7-10).

However, respondent contends that no prejudice resulted from this erroneous proceeding. Hence, reliance is had upon the second sentence of Judicial Code Section 269 (28 U.S.C.A. 391). Petitioner's right to move for a new trial on questions

of law, in the Circuit Court of Appeals is not questioned. It is not denied that the Circuit Court of Appeals erroneously failed to review the motion for a new trial, either as filed in the trial court, or as renewed and supplemented in the Circuit Court of Appeals.[2] It is not contended that the rule emanating from this court should not be re-examined and restated. It is not suggested that the decisions of the various circuit courts of appeal are not in hopeless confusion.

Respondent must rely upon the second sentence of Judicial Code, Section 269, which says in part:

> "On the hearing of any appeal . . . or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties."

It was this section which petitioner invoked when he filed his motion for a new trial with the Circuit Court of Appeals. There is nothing in the record to show that the motion was considered by that court without the bounds of the erroneous or inaccurate rule that "The grant or refusal of a new trial rests in the sound discretion of the trial court, and its action thereon is not subject to review on writ of error or appeal", which had become axiomatic among the circuits, and is most honored in its breach.

Petitioner contends that under the statutory provision relied upon by respondent, he should be discharged under the

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[2]The argument (Br. 13-14) that the motion for a new trial was passed upon (not considered) is based upon a statement in the opinion and order which does not show consideration by the court; and to say that the court did consider the motion and then pass upon it, is to assume that the court ignored the mass of jurisprudence on the power of the Appellate Court in such cases.

mandate of this court, and should have been discharged under the mandate of the Circuit Court of Appeals. This sentence of the statute is as explicit in its mandate that the court "shall give judgment after an examination of the entire record" as it is on the point that the examination of the record shall be "without regard to technical errors, defects, or exceptions". The question of what is "substantial" and what is "technical" is too large to be considered on petition for certiorari. Clearly, petitioner is entitled to have this matter considered, either in this court, or in the Circuit Court of Appeals.

Petitioner's contention that the jury was not misled by the admittedly erroneous charge ignores the natural and direct implications and inferences arising from the record, and can be supported only by speculation and conjecture. The undeniable facts are that:

1. The jury acquitted as to the identical conspiracy for which petitioner stands convicted.[3]
2. The court told the jury that the overt act was a substantive offense, and that the question for the jury to determine was whether or not this "Offense" had been committed (R. 112).
3. The Charge of the Court does not retract these two (not one) erroneous statements, but when read as a whole (R. 111-118), indicates that the trial had to do with both the real and the imaginary offenses.[4]

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[3]Respondent's contention (Br. 12, Note 5) that this is not true, ignores the last paragraph of the court's charge (R. 116-117). Under the charge, a failure to return a verdict as to either count was an acquittal as to that count, and the only negative action the jury could take was to return a verdict of not guilty as to the entire indictment.

[4]The corrective statement elicited from the court (R. 18), besides being meaningless, is qualified by the statement "as I said in the beginning of my charge". In the beginning of

Any argument that the jury did not follow the natural inferences to be drawn from the Charge of the Court, must be based upon speculation of the wildest sort. As against respondent's hypothesis in this regard, petitioner could present numerous theories, on the argument of the merits, and would do so if requested by this court. However, the question is not confined to that ever mysterious realm of what took place in the jury room. The question here is whether or not petitioner will have his day in court on a question of law involving his right to a jury trial. Petitioner submits that this is no mere "technical error, defect or exception."

Respectfully submitted,

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his charge (R. 112) he erroneously stated that the overt acts were substantive offenses, and that the question was whether or not the defendants had committed them.